



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Payment of Attorney's Fees and Cost in Jean M.
Kovalich v. Defense Investigative Service

File: B-231771

Date: December 7, 1988

DIGEST

Defense Investigative Service (DIS) entered into a compromise settlement with an employee that included the employee's attorney's fees and costs and submitted it to the General Accounting Office Claims Group to be certified for payment from the judgment fund, 31 U.S.C. § 1304. The Claims Group decided that the fees and costs had to be paid from the agency's appropriated funds pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). We affirm the Claims Group's position with respect to the attorney's fees because of a judicial determination, which the parties incorporated into the settlement, that the EAJA is applicable. However, to the extent that other costs are authorized under 28 U.S.C. § 2412(a), payment may be made from the judgment fund.

DECISION

The Defense Investigative Service (DIS) appeals a General Accounting Office Claims Group determination requiring the agency to use its own appropriated funds to pay the attorney's fees and costs included in a compromise settlement.^{1/} The agency contends the fees and costs should be paid from the judgment fund, 31 U.S.C. § 1304. We affirm the Claims Group's position with respect to attorney's fees, but conclude that DIS may be reimbursed for certain items of costs.

BACKGROUND

Ms. Jean Kovalich joined the Defense Investigative Service (DIS) in April 1974 as a GS-5 Special Agent. Ms. Kovalich

^{1/} Mr. James Stepien, Accounting and Finance Officer and Mr. Thomas Willess, General Counsel, both of the Defense Investigative Service, request our decision regarding the proper source of funds to pay the attorney's fees and costs.

advanced in the agency and in October 1985 was promoted to GM-13 Special Agent-In-Charge, a supervisory position. On October 10, 1986, the DIS demoted Ms. Kovalich to GS-12. Ms. Kovalich filed suit in a federal district court alleging that the demotion was based on the revelation that she is a homosexual and that the demotion violated her rights under the first, fifth and fourteenth amendments to the United States Constitution.^{2/} Ms. Kovalich brought the complaint for herself and all present and future homosexual employees. The complaint asked for declaratory and injunctive relief; specifically, Ms. Kovalich wanted a declaration that the agency's policies toward homosexuals were unconstitutional, reinstatement with back pay and removal of critical evaluations from her file. The complaint also sought attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

Settlement negotiations produced agreement on all the outstanding issues except attorney's fees and costs and the terms of a joint press release. Both parties agreed to have the judge resolve those issues. The parties incorporated the judge's findings, discussed below, into the final settlement signed on December 11, 1987. As part of the settlement, the court dismissed the suit with prejudice. Though Ms. Kovalich did not get any of the declarations she sought, she did get eventual reinstatement, back pay totaling \$2,469.65, the removal from her file of critical evaluations, and attorney's fees and costs totaling \$24,146.20.

The DIS submitted the settlement to the Claims Group for certification for payment from the "judgment fund," 31 U.S.C. § 1304. The Department of Justice informally advised the Claims Group that, though the back pay should be paid from the judgment fund, the attorney's fees and costs were governed by the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), which requires payment from the agency's appropriated funds. Accordingly, the Claims Group certified payment from the judgment fund only for the back pay award. The DIS now appeals the Claims Group decision.

DISCUSSION

The judgment fund statute requires that payment for settlements payable under section 2414 of Title 28 be certified by the Comptroller General if not otherwise provided for. For the reasons discussed below, we find that

^{2/} Jean M. Kovalich v. Defense Investigative Service, et al., U.S.D.C. N.D. Calif., No. C-86-5434-CAL.

the fees involved in this settlement are otherwise provided for and payable under the EAJA and therefore may not be paid from the judgment fund.

The Congress passed the EAJA to enable persons who might otherwise be deterred by litigation costs to assert claims against the government. H. Conf. Rep. 96-1434 at 5 (1980). The statute provides that the court shall award attorney's fees and costs to qualified parties who prevail in any civil action against the United States unless the court finds that the government's position was substantially justified. 28 U.S.C. § 2412(d). The EAJA "applies to parties who prevail by consent or settlement." Anspach v. District Director of Internal Revenue, 527 F. Supp. 225, 228 (D. Md. 1981), citing H. Conf. Rep. 96-1434 at 21. Awards under the Act are payable out of the appropriations of the agency involved in the litigation.

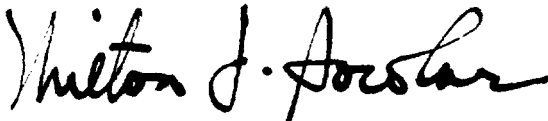
The DIS contends that the EAJA is inapplicable because Ms. Kovalich did not "prevail" and because its position was "substantially justified."

Both parties agreed to have the judge decide the amount to award for attorney's fees and costs and to be bound by the judge's decision. His reference to an hourly rate of \$75 "as presumed in the applicable statute," indicates that the judge was basing his decision on EAJA, as requested in Ms. Kovalich's complaint. See 28 U.S.C. 2412(d)(2)(A). The judge concluded that Ms. Kovalich's attorney should get all the fees and costs he sought; in fact, the judge enhanced the statutory rate because the attorney's efforts resulted in "substantial success" for Ms. Kovalich. We think his statement that plaintiff achieved "substantial success" is essentially the conclusion that the plaintiff prevailed. The judge's use of EAJA as the basis for the award of attorney's fees means that he must have concluded that the position of the United States was not substantially justified, since this is a condition for such an award.

The issues DIS now raises have, in our opinion, been foreclosed by the course of the litigation. Payment of attorney's fees and expenses from DIS appropriations was therefore proper.

Having said this, however, it appears that the total amount of \$24,146.20 may have included those court costs authorized by 28 U.S.C. § 2412(a), in addition to the fees and expenses under § 2412(d). Costs covering various court fees and the compensation of court appointed experts specified in 28 U.S.C. § 1920 may be awarded under 28 U.S.C. § 2412(a) and are payable from the permanent judgment appropriation.

See 28 U.S.C. § 2412(c)(1) (incorporating the judgment fund authorities by reference). If DIS submits appropriate documentation which will enable us to determine that portion of the \$24,146.20 allocable to costs authorized by 28 U.S.C. § 2412(a) (i.e., items enumerated in 28 U.S.C. § 1920), we will certify payment from the judgment fund to that extent.

for 
Comptroller General
of the United States